

NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.)	Case No. RC-19-189
Renewal No. 1, Permit NACC-1302)	Case No. RC-19-190
Revision No. 9, Permit NACC-1302)	
Applications)	

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
DATED JANUARY 10, 2020**

Appearances

Derrick Braaten, J.J. England and Carey Goetz, Attorneys at Law, Braaten Law Firm, 109 North Fourth Street, Suite 100, Bismarck, North Dakota 58501, on behalf of Casey Voigt and Julie Voigt.

Wade Mann, Attorney at Law, Crowley Fleck PLLP, 100 West Broadway, Suite 250, Bismarck, North Dakota 58501 on behalf of Coyote Creek Mining Company, L.L.C.

John M. Schuh, Special Assistant Attorney General, 600 E. Boulevard Avenue, 12th Floor, Dept. 408, Bismarck, North Dakota 58505, on behalf of the North Dakota Public Service Commission Advocacy Staff.

Hope L. Hogan, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street, Suite 303, Bismarck, ND 58503, as Substantive Hearing Officer.

Preliminary Statement

On May 22, 2019, Coyote Creek Mining Company, L.L.C., (“CCMC”) filed an Application for Renewal of Permit to Engage in Surface Coal Mining and Reclamation Operations (“Renewal Application”) seeking to renew Permit NACC-1302 to allow CCMC to continue to engage in surface coal mining and reclamation operations within the permit area until October 22, 2024. The application is assigned Case No. RC-19-189.

On May 20, 2019, CCMC filed an Application for Revision of Permit to Engage in Surface Coal Mining and Reclamation Operations (“Revision Application”) to identify the next five-year coal removal areas and update legal information, operation plans and reclamation plans in Permit NACC-1302 for the first renewal of the permit. The revision is identified as Revision No. 9 and the application is assigned Case No. RC-19-190.

On July 10, 2019, the North Dakota Public Service Commission (“Commission”) issued a Notice of Receipt of Renewal and Revision Applications summarizing the purpose

of the applications and giving notice that anyone may submit written comments or objections on the proposed permit renewal and request an informal conference with the Commission and the applicant on the Renewal Application or Revision Application provided the written comments, objections, or requests for informal conference must be made by August 26, 2019.

On August 26, 2019, counsel for Casey and Julie Voigt (“Voigts”) filed Comments of Casey Voigt and Julie Voigt, Objection to Mine Plan, and Request for Informal Hearing (“Comments”).

Pursuant to a Stipulation to Informal Conference Schedule entered into by counsel for the Voigts, counsel for CCMC and counsel for Commission Advocacy Staff, a Notice of Informal Conference was issued on September 19, 2019, scheduling an Informal Conference to begin at 8:30 a.m., CDT, on October 8, 2019 in the Commission’s hearing room on the 12th Floor, State Capitol, Bismarck, North Dakota.

The informal conference was held as scheduled, commencing at 8:30 a.m. CDT on October 8, 2019.

On October 21, 2019, the Commission issued an Order providing that CCMC’s applications for Revision No. 9 and Renewal No. 1 to Surface Coal Mining Permit NACC-1302 satisfies all permit revision and renewal standards and North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code Article 69-05.2. The Commission further ordered that CCMC shall comply with Special Condition No. 1, attached to the approval of Revision No. 9.

On October 21, 2019, in Case No. RC-19-189, the Commission issued a Renewal of Permit to Engage in Surface Coal Mining and Reclamation Operations granting CCMC’s Renewal No. 1 to Permit NACC-1302 for five years to allow CCMC to continue to operate under approved mining and reclamation plans for the permit until October 21, 2024.

On November 20, 2019, counsel for the Voigts filed a Formal Hearing Request.

On November 21, 2019, a Notice of Formal Hearing was issued, scheduling a Formal Hearing on the Renewal Application and the Revision Application, to begin at 9:00 a.m., CDT, on December 16, 2019 in the Commission’s hearing room on the 12th Floor, State Capitol, Bismarck, North Dakota.

On December 6, 2019, counsel for the Voigts filed a Motion to Continue Formal Hearing. The Motion to Continue Formal Hearing was denied by the ALJ on December 10, 2019.

The Formal Hearing was held as scheduled, commencing at 9:00 a.m. CDT on December 16, 2019 and concluding on December 17, 2019.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered all the evidence presented, the undersigned Administrative Law Judge makes the following:

Findings of Fact

1. On October 22, 2014, the Commission issued Surface Coal Mining Permit No. NACC-1302 (“Permit NACC-1302”) to allow CCMC to conduct surface coal mining and reclamation operations at the Coyote Creek Mine, to supply coal to the Coyote Power Station.
2. On May 22, 2019, CCMC filed its Renewal No. 1 to Permit NACC-1302, seeking to allow CCMC to continue to operate within the existing permit area until October 22, 2024.
3. On May 20, 2019, CCMC filed its Revision No. 9 to Permit NACC-1302, identifying the next five-year coal removal subarea, modifying the post-mining topography and updating the mining and reclamation plans prior to permit renewal.
4. On August 26, 2019, the Voigts filed comments and objections to the Renewal Application and the Revision Application and requested an informal hearing on the applications. The August 26th comments covered seven topics. By letter dated October 4, 2019, counsel for the Voigts indicated that they were no longer intending to address the cultural resource issue or the CCMC/Coyote Station contract issue at the informal conference. The five remaining issues addressed at the informal conference on October 8, 2019, include 1) Access, 2) Dust, 3) Alluvial Valley Floors, 4) Sediment and 5) Reclamation.
5. On October 21, 2019, the Commission issued its Renewal of Permit to Engage in Surface Coal Mining and Reclamation Operations allowing CCMC to continue to operate under approved mining and reclamation plans for the permit until October 21, 2024.
6. On November 20, 2019, the Voigts requested a Formal Hearing. On December 13, 2019, they filed Requested Supplemental Information Regarding Formal Hearing voicing five areas of concern which were the same five issues addressed at the October 8, 2019 informal conference.
7. The Commission has previously addressed the same access issue in Case No. RC-13-850 and the dust issue in Case No. RC-14-846 and concluded in both cases that they do not have jurisdiction over either of these issues.
8. The Commission has previously addressed the same alluvial valley floor issue in Case No. RC-13-850 and concluded that there is no alluvial valley floor beneath the Voigts alfalfa fields. The North Dakota supreme court affirmed the Commission’s conclusion that there is no alluvial valley floor.

Access

9. The Voigts expressed concern about a road closed by Mercer County and request that the Commission require CCMC to comply with N.D.A.C. § 69-05.2-09-07.

10. With respect to the road at issue, the Commission has previously stated that “[t]he closure of county roads in the vicinity of the Coyote Creek Mine is under the jurisdiction of the Mercer County Commission, not the Public Service Commission.” (Docket No. 125, Case No. RC-13-850, ¶39 of Findings of Fact).

11. No evidence was presented to establish that the Voigts have been denied access and the requested relief has already been covered by CCMC’s agreement with Mercer County.

12. The road at issue is subject to a Mercer County Resolution and a written agreement between Mercer County and CCMC to maintain access and restore the road after completion of mining operations. (Docket No. 5, Ex. A, Case No. RC-19-189 and Docket No. 8, Ex. A, Case No. RC-19-190). The resolution and agreement are included in CCMC’s permit.

13. By Resolution of the Mercer County Commission dated May 18, 2016, the County determined that “the [Mercer County] Commission has jurisdiction over the subject matter of the Petition and the road involved therein.” (Docket No. 5, Ex. A, Case No. RC-19-189 and Docket No. 8, Ex. A, Case No. RC-19-190).

14. The County further concluded “[t]hat said road is not required due to readily accessible alternate routes of travel” and “[t]hat the temporary closing of said road does not deprive adjacent landowners access to their property.” (Docket No. 5, Ex. A, Case No. RC-19-189 and Docket No. 8, Ex. A, Case No. RC-19-190).

15. In addition to the County Resolution and agreement between CCMC and the County, CCMC also entered into a Memorandum of Access Agreement with the Voigts addressing access.

16. The Commission has no jurisdiction over the road and with no evidence of access being denied, it is unnecessary to impose an additional permit condition that is already covered by CCMC’s road agreement with Mercer County.

Alluvial Valley Floors

17. The Voigts assert that their alfalfa fields along the Coyote Creek are subirrigated and meet the definition of an alluvial valley floor. To support their claim, the Voigts reference four holes they state were drilled by Knife River Corporation in each alfalfa field approximately two years ago. The south alfalfa field allegedly showed groundwater present at a depth of 11 feet in a seam of gravel approximately two feet thick and that the cores drilled in the north alfalfa field allegedly showed groundwater present at a depth of

13 feet in a seam of gravel approximately 1.5 feet thick. No evidence was provided at the formal hearing documenting or supporting the allegations.

18. The Voigts further rely on soil cores drilled by Mr. Lance Loken in the alfalfa fields on October 4, 2019. Mr. Loken testified that groundwater was located in these fields at approximately 11 feet, allegedly within the rooting zone of the Voigts' alfalfa. Based entirely on this information, the Voigts believe they have subirrigation and an alluvial valley floor beneath the fields. They request an updated AVF determination and monitoring wells.

19. The issue of Alluvial Valley Floors on these same lands has been conclusively decided and administrative res judicata prevents this issue from being re-litigated through this renewal and revision process. *See* Docket No. 125, Case No. RC-13-850; *see also Voigt v. N.D. Pub. Ser. Comm. and Coyote Creek Mining Co., L.L.C.*, 2017 ND 76. The issue of Alluvial Valley Floors beneath these two fields was extensively addressed at the initial permit hearing for Permit No. NACC-1302 in Case No. RC-13-850. In that case, there were two separate alluvial valley floor reports examined, and over a period of three days of testimony, the Commission heard from three expert witnesses providing testimony on the alluvial valley floor issue, including testimony from the Voigts' expert witness. The Commission concluded that there was no Alluvial Valley Floor. The Voigts appealed to the district court and the North Dakota supreme court, both of which confirmed that there was no Alluvial Valley Floor. *See Voigt*, 2017 ND 76.

20. No new information has been provided to demonstrate the existence of any AVF. Mr. Loken testified with respect to his belief in the existence of an AVF beneath the Voigts' alfalfa fields. Mr. Loken admitted that he is not an AVF expert and is not familiar with the statutory requirements for demonstrating an AVF, yet at the hearing he opined that there was an alluvial valley floor beneath the Voigts' alfalfa fields. Mr. Loken based this opinion solely on the information he gathered on Friday, October 4, 2019, which was the core samples he took from the Voigts' fields and information explained to him by counsel for the Voigts.

21. The North Dakota supreme court highlighted the extensive work that previously went into the determination that there was no AVF present on the Voigts' property. The court noted that "[o]n the basis of the various studies and voluminous data collected, both Dr. Bickel and Beechie, the Commission's expert, opined that no subirrigation is occurring. Additionally, Moos testified regarding the lack of subirrigated soils, and Flath testified that soils, rather than subirrigation explain the difference in productivity between Voigt's upland and lowland alfalfa fields." *See Voigt*, 2017 ND 76, ¶36. Mr. Loken admitted that he reviewed none of this information. He did not examine the 2009 or the 2013 AVF evaluation reports or any of the testimony from the three expert witnesses on AVF at the hearing. The Voigts carry the burden of proof on this issue and Mr. Loken's conclusion based solely on the October 4th data and completely ignoring the 2009 and 2013 reports as well as the testimony of three expert witnesses on the same issue from the original permit hearing is not credible and comes nowhere near meeting the burden. The Voigts have again not demonstrated the existence of an AVF.

22. The vast network of monitoring wells CCMC has had in place since 2012 are more than adequate to monitor the hydrology of the alluvium and other aquifers. CCMC has demonstrated that not only have they not affected ground water levels in the alluvium, but that given the geologic structure, it is not possible for CCMC's mining activities to affect ground water levels in the alluvium. CCMC's groundwater monitoring plan is sufficient and no additional monitoring requirements are necessary.

Sediment

23. The Voigts offered photographs showing sediment buildup in Coyote Creek near the P31-01 discharge and allege that the sediment buildup may be the result of discharge from CCMC's retention pond.

24. While the photographs show sediment build up in Coyote Creek, they do not support the Voigts' allegations that the buildup is caused by CCMC's operations.

25. The photographs show larger pieces of scoria in and on top of the sediment. Larger rocks deposited on top of a boulder at the foot of the sediment is also present. Sediment is also present on the bank of the creek opposite of CCMC's discharge pipe.

26. CCMC's pond discharges are regulated. The pond has been discharged twelve times since its construction in 2015. All discharges were tested and all met the effluent limitations of the discharge permit.

27. The amount of sediment in the pictures, combined with the mixing of scoria pieces, larger rocks deposited on top of the boulder and sediment buildup along both banks of the creek are more consistent with sediment being carried from an upstream source and deposited during a high flow.

28. Greg Thompson, a professional engineer with Houston Engineering raised concerns in 2015 about head cutting caused by the Voigts' by-pass channel upstream of the area in the photographs resulting in erosion and sediment build up downstream. *See* CCMC Exhibit 15. Mr. Thompson noted that "[t]he erosion through this area will cause soil particles to be suspended in the flow which will eventually deposit at some location downstream. This deposition could occur near the proposed haul road culverts, but it could also remain suspended all of the way to the Knife River. I suggested that the effects of the erosion be monitored in the future so it doesn't reduce the capacity of the downstream channel or culverts." *Id.* Mr. Thompson further explained that "I expect the head cutting to continue migrating upstream which could introduce problems with the foundations of upstream structures such as the bridge along CR 25. The head cutting should be addressed if any improvements are made to any structures upstream of the bypass channel." *Id.*

29. The Voigts had Shane Bofto testify regarding the sediment buildup in Coyote Creek. Mr. Bofto testified regarding sediment ponds and discharge from sediment ponds. Mr. Bofto did not conduct any type of inspection at the mine and did not examine any of

CCMC's discharge records. He had little knowledge of the erosion from the Voigts' by-pass and made no inspection of the by-pass nor did he attempt to determine what actually caused the sediment buildup in the creek. He generally testified as to recommendations regarding sediment ponds and their discharge. With respect to sediment ponds and their discharge, CCMC is already subject to regulation to varying degrees by DEQ, the US Army Corps of Engineers and the Commission.

30. CCMC has no ability to prevent sediment build up in an accretion area of the creek near CCMC's box culvert resulting from erosion of the Voigts' by-pass channel located upstream. CCMC's sediment ponds are adequately regulated, properly discharged and no additional permit conditions relating to the sediment are necessary.

Reclamation

31. The Voigts initially raised concerns with reclamation in their Comments filed with the Commission on August 26, 2019. The Comments referenced a county reclamation project that in the Voigts' opinion had failed. They used this reclamation project as an example to suggest that CCMC is not equipped to reclaim the mine. The Voigts indicated that they were not requesting a specific fix for the issue at that time and they presented nothing further relating to the county reclamation project at the informal conference.

32. After the Commission's comment and objection deadline closed on August 26, 2019, the Voigts requested an inspection of the mine relating to reclaimed areas.

33. The Voigts conducted the inspection on October 1, 2019, with Commission staff and representatives of CCMC. The areas inspected were in the early stages of the reclamation process, were outside of the scope of the initial comments filed by the Voigts and did not include the county project initially referenced by the Voigts.

34. The Voigts request special conditions to the permit requiring the use of certified-weed-free mulch, straw and seed and allowing the Voigts to inspect reclamation progress annually.

35. Commission representatives, Bruce Beechie, Environmental Scientist, Bruce A. Johnson, P.E., Environmental Engineer, and Guy A. Welch, Environmental Scientist filed an Inspection Report documenting the findings from the October 1, 2019 partial inspection. (Docket No. 30, Case No. PU-19-189 and Docket No. 38, Case No. PU-19-190).

36. Mark Anderson testified on behalf of the Voigts and raised concerns about CCMC's reclamation practices. Jessica Unruh testified on behalf of CCMC and addressed all of the concerns raised by Mr. Anderson and the Voigts.

37. The Voigts have inspection rights under the terms of their lease and failed to present evidence that the certified-weed-free mulch, and straw is even available for these reclamation projects.

38. CCMC has a reclamation plan and schedule in place with the Commission. Dean Moos, Reclamation Division Director, and Guy Welch testified on behalf of the Reclamation Division. Neither of them recommended imposing any new permit requirements relating to reclamation.

39. CCMC's current reclamation plan is sufficient and no additional permit requirements relating to reclamation are necessary at this time.

Dust

40. The Voigts presented pictures and video of dust near their ranch and requested a condition to the permit requiring dust monitors at key locations within the active mining area.

41. The allegations of dust at the mine and the Voigts' concerns with the fugitive dust control plan were previously addressed at length by the Commission in Case No. RC-14-846. *See* Docket No. 56, Case No. RC-14-846. The Commission's extensive findings detail the history of CCMC's air control permit and fugitive dust control plan and the Commission's lack of jurisdiction over the plan. *Id.*

42. The North Dakota Department of Environmental Quality ("DEQ") currently has exclusive jurisdiction over permitting of air quality in North Dakota pursuant to the Clean Air Act. *See* N.D. Cent. Code Chapter 23.1-06. The Commission does not have jurisdiction to enforce provisions of the Clean Air Act but as a state-approved program, has adopted a specific rule governing what an applicant must set forth in the permit application with respect to air quality. The Commission's rule set forth in N.D. Admin. Code § 69-05.2-09-05, provides that "[t]he applicant shall specify the measures to comply with the air pollution control requirements of the State Department of Health and any other measures necessary to effectively control wind erosion and attendant air pollution."

43. In order to comply with N.D. Admin. Code § 69-05.2-09-05, CCMC, by application dated September 9, 2014, applied to the North Dakota Department of Health for an air quality permit to construct its proposed surface coal mine and coal processing facility.

44. That by obtaining Air Pollution Control Permit to Construct No. PTC15001, CCMC satisfied that portion of the requirement of the mining regulation, N.D. Admin. Code § 69-05.2-09-05 specifying compliance with the air pollution control requirements of the Department of Health (n/k/a the DEQ).

45. CCMC has a Fugitive Dust Control Plan on file with the Commission and with the DEQ. The plan sets forth detailed measures used to control fugitive dust from facility operations. The plan includes provisions on haul road dust, open coal storage pile dust, stabilization of disturbed areas, measures to be implemented at the coal processing facility, and training of employees and has been deemed acceptable to the DEQ on multiple occasions.

46. The Voigts challenge the sufficiency of CCMC's Plan with respect to air quality matters. Their challenge focuses primarily on air quality issues subject to CCMC's Permit to Construct No. PTC15001 and which are under the jurisdiction of the DEQ. This is not the proper venue to challenge these air quality issues. The Commission does not have authority or jurisdiction to regulate air quality at coal mines in North Dakota. That jurisdiction and authority is vested in the DEQ. The Voigts' challenge to the air pollution control requirements in this proceeding is a collateral attack upon the DEQ's authority and upon the permit to construct.

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

1. That the Commission has jurisdiction over CCMC's mining and reclamation operations in North Dakota, including Permit No. NACC-1302, Renewal No. 1 and Revision No. 9 thereto.
2. That CCMC's Renewal No. 1 application to surface coal mining Permit NACC-1302 meets all permit renewal standards under North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code, Article 69-05.2 and carries "with it the right to successive renewal".
3. That CCMC's Revision No. 9 application to surface coal mining Permit NACC-1302 meets all permit revision standards under North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code, Article 69-05.2.
4. That the road identified by the Voigts in their Comments as County Road 25 is under the jurisdiction of Mercer County, North Dakota. North Dakota Century Code § 24-05-17 provides that "[t]he boards of county commissioners in their respective counties have the sole authority and responsibility to acquire land for, construct, maintain, and operate the county road system as designated and selected by them." By Resolution of the Mercer County Commission dated May 18, 2016, Mercer County confirmed its jurisdiction over this road. The Commission cannot make permit conditions that would infringe upon Mercer County's jurisdiction over the road.
5. That jurisdiction and authority to regulate air quality in North Dakota is solely within the purview of the North Dakota Department of Environmental Quality pursuant to North Dakota Century Code Chapter 23.1-06.
6. That CCMC has complied with North Dakota Century Code § 38-14.1-24(4) and North Dakota Administrative Code § 69-05.2-09-05 by obtaining the Air Pollution Control Permit to Construct No. PTC15001, from the Department of Health.
7. That allegations asserting noncompliance with air quality laws and regulations and challenging the sufficiency of CCMC's Fugitive Dust Control Plan are outside the

jurisdiction of the Commission and constitute an impermissible collateral attack upon the Permit to Construct No. PTC15001 as issued by the North Dakota Department of Health and currently under the jurisdiction of the North Dakota Department of Environmental Quality. Special Condition No. 1 that was attached to Revision No. 9 by Order of the Commission on October 21, 2019, infringes upon the jurisdiction of the North Dakota Department of Environmental Quality and should be revoked.

8. That pursuant to North Dakota Century Code § 38-14.1-22(2), the Voigts have the burden to demonstrate that Permit NACC-1302 should not be renewed.

9. That CCMC has complied with North Dakota’s mining law and mining regulations in its submittal of Renewal No. 1 and Revision No. 9 and that no basis has been established for the Commission to deny or delay renewal or revision of Permit NACC-1302 or to seek further amendments to the revision to the permit with respect to the comments and issues raised by the Voigts.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

Order

The Commission orders:

1. That Renewal No. 1 as submitted by CCMC, fulfills the requirements of North Dakota’s mining law and mining regulations.
2. That Revision No. 9 as submitted by CCMC, with respect to the comments and issues raised by the Voigts, fulfills the requirements of North Dakota’s mining law and mining regulations.
3. That Special Condition No. 1, attached to the prior approval of Revision No. 9, shall be revoked.
4. That Permit NACC-1302 shall be renewed for an additional five years and Revision No. 9 be approved as scheduled to allow CCMC to continue to engage in surface coal mining and reclamation operations within the permit area until October 22, 2024.

PUBLIC SERVICE COMMISSION

Julie Fedorchak
Commissioner

Brian Kroshus
Chairman

Randy Christmann
Commissioner